

THE TAX DECISIONS OF THE SUPREME COURT,
1940 TERM

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B. *The Federal Estate Tax* *

I. Valuation

The general rule for valuing a decedent estate under the federal estate tax is that the decedent's property is to be listed at its fair market value at the date of his death.⁹⁹ In a period of rapid deflation this leads to considerable hardship. During the early days of the depression, for example, there were cases where valuing a decedent estate at the date of death led to a tax as great, or even greater, than the amount of the estate, when the time to pay the tax arrived. To relieve situations of this sort, Congress provided in 1935¹⁰⁰ that the representatives of a decedent's estate might elect to value the estate as of the date of the decedent's death, or one year thereafter. At the same time to cover property sold or distributed during the year when the estate was valued a year after death, it was provided that such property should be listed at its value at the time of disposal.¹⁰¹ In interpreting these provisions the Treasury ruled that when an estate was valued a year from death, the representatives of the estate must include as part of the gross estate any rents, royalties, interest or dividends received during the year.¹⁰² In three cases disposed of by a single opinion,¹⁰³ the Supreme Court held that this was erroneous. In the lower courts the Government contended that bonds, stocks and leased properties of a decedent consist at his death of both rights of ownership and rights to income. When such assets are valued a year after death, interest, dividends, rents or royalties received during the year really represent payments on account of principal and must be included in the estate to reflect its true value. Before the Supreme Court the Government shifted its position slightly,

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* This is a continuation of the author's discussion of the broader topic, Federal Taxes. Subsection A. *Federal Income Tax*, the first subdivision of that topic, is considered in Lowndes, *The Tax Decisions of the Supreme Court, 1940 Term* (1941) 90 U. OF PA. L. REV. 1, in which footnotes 1 to 98 appear.

99. INT. REV. CODE, § 811 (1939).

100. INT. REV. CODE, § 811 (j) (1939).

101. *Ibid.*

102. U. S. Treas. Reg. 80, Art. 11 (1937).

103. *Maass v. Higgins*, 312 U. S. 443 (1941), 89 U. OF PA. L. REV. 989. The other cases disposed of by the same opinion were *Estate of Abendroth v. Comm'r* and *Estate of Blaque v. Comm'r*.

tying its argument more tightly to the wording of the statute. Still starting from the initial premise that the properties in question comprised both rights of ownership and rights to receive income, the Government argued that when interest, dividends, rents or royalties were received, this constituted a *pro tanto* disposition of the rights to income, and the property thus disposed of must under the statute be included in the gross estate at its value at the time of disposition. Mr. Justice Roberts and the majority of the Court were not impressed by the Government's reasoning. In delivering the majority opinion, Mr. Justice Roberts said that in common understanding interest, dividends and rents are regarded as income. When they are collected by a decedent's estate the executors are required to pay a tax upon them as income. In the hands of a living holder such receipts are not treated as payments on account of principal. Nor does the promise to make such payments have any market value apart from the asset of which it is an incident. Although the promise to pay interest or rent and the expectancy of dividends affect the value of income-producing property, they are not valued separately in appraising the worth of an asset at a given time. When an estate is valued as of the date of the decedent's death the market value of his property and income accrued at the date of death is included in the gross estate. In providing an optional date for valuation a year after death, Congress presumably did not intend to introduce a different method of valuation. If it had, it would have said so. The fact that the report which accompanied the amendment¹⁰⁴ introducing the optional valuation date gave an example of the use of this method of valuation, which did not include dividends or interest received during the year, is further evidence of Congress's intention not to require this. Mr. Justice Roberts added that it is a "highly artificial concept that an interest payment is a disposition, *pro tanto*"¹⁰⁵ of the right to income. Moreover, he said that requiring dividends, rents and interest received during the year to be included in the gross estate when it was valued a year after death would lead to double taxation under both the income and the estate tax, and although "the Constitution does not forbid double taxation, the intent to impose it upon a given receipt is not presumed."¹⁰⁶

Mr. Justice Black and Mr. Justice Douglas dissented. They were "of the view that this question is peculiarly appropriate for administrative interpretation"¹⁰⁷ and that the Treasury's ruling should, therefore, be allowed to stand.

104. H. R. REP. No. 1885, 74th Cong., 1st Sess. (1935) 10-11.

105. *Maass v. Higgins*, 312 U. S. 443, 449 (1941).

106. *Ibid.*

107. *Ibid.*

2. Insurance

Although the other two cases decided at the last term in connection with the federal estate tax reach an eminently fair and sensible result, they will be a sad blow to insurance agents. Under the federal estate tax there is a special exemption of \$40,000, in addition to the general statutory exemption of \$40,000, for insurance payable to beneficiaries other than the estate of the insured.¹⁰⁸ In the past a favored scheme for minimizing taxes, which grew out of the insurance exemption, involved the purchase of a single-premium insurance policy together with an annuity contract. By this procedure the purchaser would provide himself with substantially the same income during his life that he would have received if he had retained his property. At his death, moreover, it was assumed that his estate would pass as "insurance" entitled to the insurance exemption. From the insurance company's point of view this was a profitable arrangement although the age of the insured might really have made him uninsurable. If the insured died soon after the insurance policy was written, the company would make up any loss in that direction out of what it saved in connection with the annuity. If, on the other hand, the insured survived beyond a normal expectancy, the loss on the annuity would be offset by the earnings upon the premium paid in for the insurance. A concrete case makes this clearer.

In *Helvering v. LeGierse*¹⁰⁹ a lady eighty years old, less than a month before her death, took out a single-premium insurance policy and at the same time entered into an annuity contract with the same company. The face value of the insurance policy, which was issued without any physical examination and was payable to the insured's niece, amounted to \$25,000. It cost \$22,946. The annuity contract provided for annual payments of \$589.80 and cost \$4,179. The two contracts were separate, but the insurance policy would not have been issued without the annuity, and the company, of course, expected any loss upon one to offset by gain upon the other. Upon the insured's death the question arose whether the insurance paid to the niece was insurance payable to a beneficiary other than the estate of the insured and entitled as such to the \$40,000 exemption provided by the federal estate tax. Over the dissent of the Chief Justice and Mr. Justice Roberts the Supreme Court held that it was not. Mr. Justice Murphy said that although neither Treasury Regulations nor legislative history made clear just what the statute meant by insurance, the meaning of this

108. INT. REV. CODE, § 811 (g) (1939).

109. 312 U. S. 531 (1941).

term could be ascertained from the statutory language itself and from the apparent purpose of Congress in enacting those provisions. By "insurance", he declared, Congress meant amounts received as the result of an actual "insurance risk". Since in the instant case there was no such risk, the amount received by the niece could not be regarded as insurance in the statutory sense and, not being entitled to the insurance exemption, was taxable as a gift intended to take effect in possession or enjoyment at or after death.

*Estate of Keller v. Commissioner*¹¹⁰ raised substantially the same the same problem as the *LeGierse* case with a minor difference which the Court found to be immaterial. In this case a decedent when he was seventy-four years of age had purchased a single-premium life insurance policy and at the same time entered into an annuity contract with the same insurance company. That the company took some risk in writing the insurance was shown by the fact that the total consideration for both contracts was but 106 per cent. of the face value of the insurance policy, and it later became necessary to increase the rate for this combination of contracts to 108 per cent. and still later to 110 per cent. of the face of the insurance policy. The Court, however, held that the insurance in the *Keller* case was not insurance in the sense in which that term is employed under the federal estate tax. The risk taken by the insurer was not an insurance risk, it was simply an ordinary business risk, such as a bank assumes when it accepts a depositor's funds and invests them. "That the insurance company subsequently changed the total charge for this particular combination of contracts," said Mr. Justice Murphy, "because it was unprofitable does not establish the existence of an insurance risk. Rather, it illustrates strikingly the interrelation of the two agreements and emphasizes the effort of the company to remove all possible investment risk."¹¹¹

It is perhaps worth noting in these cases that although the fact that the insured is not required to take a physical examination is persuasive of the absence of an insurance risk, it is not conclusive. On this point Mr. Justice Murphy said in *Keller v. Commissioner*: "Absence of a physical examination may well be inconclusive as to the existence of an insurance risk. For example, some companies do not require such an examination for group insurance. But there the risk as to one is distributed among the group, an insurance risk squarely within the definition stated in the *LeGierse* case. Here the annuity issued with the policy did more than substitute for a physical examina-

110. 312 U. S. 543 (1941), *affirming*, *Comm'r v. Keller's Estate*, 113 F. (2d) 833 (C. C. A. 3d, 1940), 89 U. OF PA. L. REV. 125.

111. 312 U. S. 543, 544 (1941).

tion. It removed the necessity for any risk distribution and completely countervailed a risk otherwise assumed in the 'insurance' policy."¹¹²

C. *The Federal Gift Tax*

1. Valuation

The amount of a gift for purposes of the federal gift tax is "the value thereof at the date of the gift."¹¹³ Three cases at the last term had occasion to pass upon what this means in connection with a gift of a single-premium insurance policy. In all three cases the Supreme Court held that the proper standard of valuation was the cost of duplicating the policy, rather than its cash-surrender value.

In *Guggenheim v. Rasquin*¹¹⁴ the taxpayer purchased single-premium policies of insurance having an aggregate face value of \$1,000,000 for \$852,438.50, which policies she immediately assigned to her three children. In making out her gift tax return she valued the policies at their cash-surrender value of \$717,344.81. The Commissioner, contending that they should have been listed at cost, determined a deficiency. The taxpayer paid the deficiency and sued in a district court for a refund. The District Court decided in her favor. The Circuit Court of Appeals however, reversed the District Court, and the Supreme Court of the United States affirmed the judgment of the Circuit Court of Appeals. Mr. Justice Douglas, in delivering the unanimous opinion of the Court, said that in computing the value of a single-premium insurance policy for gift tax purposes one must take into account not only its investment value, represented by the cash-surrender value, but its insurance value as well. Both of these values, he said, are reflected in cost, which is the best available criterion of value.

*Powers v. Commissioner*¹¹⁵ raised the same question as *Guggenheim v. Rasquin* and was decided in the same way upon the authority of that decision. Unlike the *Guggenheim* case, however, the *Powers* case originated in a petition to the Board of Tax Appeals to redetermine a deficiency, rather than in a suit for refund. The Board of Tax Appeals held that the value of a single-premium policy of insurance for gift tax purposes is its cash-surrender value. The Circuit Court of Appeals reversed the Board's decision, so when the case reached the Supreme Court it had before it two questions: (1) whether the Circuit Court of Appeals was correct in ruling that the proper method of valuation was cost, (2) whether it was entitled to substitute its judg-

¹¹² *Id.* at 545.

¹¹³ INT. REV. CODE, § 1005 (1939).

¹¹⁴ 312 U. S. 254 (1941).

¹¹⁵ 312 U. S. 259 (1941).

ment for that of the Board on this point. In sustaining the judgment of the Circuit Court of Appeals, Mr. Justice Douglas held that it had not only declared the proper standard of valuation, but also had acted properly in substituting its judgment for that of the Board. "What criterion should be employed for determining the value of gifts," he said, "is a question of law . . . Accordingly the Circuit Court of Appeals was justified in reversing the decision of the Board as 'not in accordance with law.' " ¹¹⁶

When the Supreme Court speaks of the cost of a single-premium policy of insurance as the proper measure of value for gift tax purposes, it does not mean the amount the taxpayer paid for the policy, but the amount it would cost him to replace the policy at the time of the gift. Where the policy is purchased and given away at the same time, as policies were in the *Guggenheim* and *Powers* cases, this distinction is not, of course, important. Where, however, the policy is not given away until some time after its purchase, actual cost and replacement cost differ. In this situation replacement cost is controlling. This was illustrated by *United States v. Ryerson* ¹¹⁷ where the taxpayer in 1928 and 1929 took out single-premium policies of insurance which she did not give away until 1934. The Supreme Court held, again speaking through Mr. Justice Douglas and again without dissent, that the proper method of valuing these gifts was to take the replacement costs at the time they were given away. "As in the case where the issuance of the policies and their assignment as gifts are simultaneous," said Mr. Justice Douglas, "cash-surrender value reflects only a part of the value of the contracts. The cost of duplicating the policies at the dates of the gifts is, in absence of more cogent evidence, the one criterion which reflects both this insurance and investment value at that time." ¹¹⁸

The cases holding that gifts of single-premium insurance policies must be valued for gift tax purposes at their replacement value, rather than their cash-surrender value, naturally suggest the problem of whether or not this same criterion is to be applied to gifts of other insurance policies. Presumably, a policy upon which premiums are being paid has an insurance value as well as an investment value. Cost would seem to be as cogent a criterion of the real value of the policy here as in the case of a single-premium policy. The Treasury Regulations in force when these cases arose provided that insurance policies should be valued according to their cash-surrender values. ¹¹⁹ Mr. Jus-

¹¹⁶ *Id.* at 260.

¹¹⁷ 312 U. S. 260 (1941).

¹¹⁸ *Id.* at 261.

¹¹⁹ U. S. Treas. Reg. 79, Art. 2 (5) (1933). This has been changed, however, under the present Regulations. U. S. Treas. Reg. 79, Art. 19 (9) (1936).

tice Douglas, in commenting upon this regulation in *Guggenheim v. Rasquin*, said that this applied "only to policies upon which current premiums are still being paid at the date of the gift, not to single-premium policies."¹²⁰ This may or may not indicate tacit Supreme Court approval of the cash-surrender value method of valuation in connection with gifts of policies upon which current premiums are being paid at the date of the gift. Whether or not this is so, it would seem practically impossible to distinguish a gift of a single-premium policy and a gift of a fully paid-up policy which was paid for in installments. Apparently the proper method of valuing the latter is the cost of replacement, not the cash-surrender value.

2. Exemptions

In addition to the \$40,000 exemption granted by the federal gift tax,¹²¹ there is an exemption or exclusion up to a specified amount for gifts made to the same donee during the calendar year. Under the 1932 Act, for example, it was provided that "In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts . . . shall not . . . be included in the total amount of gifts made during such year."¹²² Under the current law this exemption has been reduced to \$4,000.¹²³ Moreover, in addition to providing that there shall be no exclusion for gifts of future interests, the present law disallows the exclusion for gifts in trust.¹²⁴

The exemption for gifts in trust was disallowed because of a controversy as to whether such a gift is a gift to the trust or to the beneficiaries of the trust. The controversy finally reached the Supreme Court at the last term in the case of *Helvering v. Hutchings*.¹²⁵ In 1935, the taxpayer transferred property in trust for her seven children. In making out her gift tax return she excluded \$35,000 from the value of the property transferred on the theory that she had made gifts to beneficiaries of the trust and was, therefore, entitled to seven \$5,000 exclusions. The Commissioner, however, contended that the gift had been made to the trust, rather than to the beneficiaries of the trust, and determined a deficiency on the ground that the taxpayer was entitled to but one \$5,000 exclusion. The Board of Tax Appeals upheld the Commissioner. The Circuit Court of Appeals, on the other hand, held

120. 312 U. S. 254, 258 (1941).

121. INT. REV. CODE, § 1004 (a) (1) (1939).

122. REVENUE ACT OF 1932, § 504 (b), 47 STAT. 247.

123. INT. REV. CODE, § 1003 (b) (2) (1939).

124. *Ibid.*

125. 312 U. S. 393 (1941).

that the taxpayer had made gifts to the beneficiaries of the trust and reversed the Board's decision. The Supreme Court affirmed the judgment of the Circuit Court of Appeals. Mr. Justice Stone, writing for a unanimous Court, pointed out that a gift tax is not imposed upon the naked transfer of legal title, since, for example, a transfer in trust where the transferor reserves the beneficial interest is not a taxable transfer, but is imposed upon the transfer of the beneficial interest in property. From this he argued that the donee of a gift in trust is the beneficiary of the trust, rather than the trust itself. He added that "In common understanding of common use of language a gift is made to him upon whom the donor bestows the benefit of his donation. One does not speak of making a gift to a trust but rather to his children who are its beneficiaries."¹²⁶ This construction of the statute, as Mr. Justice Stone also observed, has the practical merit of preventing tax avoidance, since if the statute were construed to make the trust the donee, rather than the beneficiary of the trust, any amount might be given away tax-free by creating multiple trusts for the same beneficiary. It was fear that the statute would be construed to make the donee of a gift the trust, rather than the beneficiary of the trust, and thus open the door to gift tax avoidance, which led Congress to abolish the exemption for gifts in trust.¹²⁷ In view of the fact that the Supreme Court has definitely precluded any such possibility, there appears to be no sound reason why the exemption should not now be restored.

The \$5,000 exclusion of the earlier laws and the \$4,000 exclusion under the present law is not allowed in the case of gifts of future interests.¹²⁸ In *United States v. Pelzer*¹²⁹ the question presented to the Supreme Court was what does the federal gift tax mean by the expression "future interest". The taxpayer created a trust in 1932 for the benefit of eight named grandchildren and any other grandchildren who might be born during the continuance of the trust. By the terms of the trust the trustees were to accumulate the income from the trust property for ten years. At the expiration of this period they were directed to pay over an "equal grandchild's distributive share" of the income to each of the named grandchildren who was then living and had attained the age of twenty-one. The other named grandchildren were to receive like shares of income when they became twenty-one. Afterborn grandchildren were also to share in income upon the same terms as the named grandchildren, except that they were to have no interest in the income distributed prior to their birth and their shares

126. *Id.* at 396.

127. SEN. REP. NO. 1567, 75th Cong., 3d Sess. (1938) 41.

128. INT. REV. CODE, § 1003 (b) (1939).

129. 312 U. S. 399 (1941).

of income were to be paid to them after the ten year period of accumulation even though they had not yet attained their majorities. The trust instrument made further provision for gifts over of his or her share of income upon the death of a grandchild, which provisions the Court said were not material to the case. Twenty-one years after the death of the last survivor of the named grandchildren the trust was to terminate, and corpus and accumulated income were to be divided in equal shares among the then surviving grandchildren and the issue *per stirpes* of deceased grandchildren.

In 1933, 1934 and 1935 the taxpayer made additions to the 1932 trust. In connection with the gift taxes due with respect to these additions he contended that he was entitled to a \$5,000 exclusion for each named beneficiary of the trust, on the theory that they were the real donees of the gifts he had made, and that these gifts were gifts of present, rather than future interests. The Commissioner claimed, however, that the gifts were made to the trust rather than to the beneficiaries of the trust, and that the taxpayer was, consequently, entitled to but one \$5,000 exclusion for each calendar year. After paying the taxes demanded by the Commissioner the taxpayer sued in the Court of Claims to recover overpaid gift taxes for the years 1933, 1934 and 1935. The Court of Claims decided in his favor. The Supreme Court, however, reversed the judgment of the Court of Claims. The Chief Justice, delivering the opinion of a unanimous Court, agreed with the taxpayer that the additions to the 1932 trust represented gifts to the beneficiaries of the trust, rather than to the trust itself. However, he denied that the taxpayer was entitled to a \$5,000 exclusion for each beneficiary, or for that matter to any exclusion at all, because he said that the gifts were gifts of future interests. In arguing that the gifts were gifts of present interests, the taxpayer had relied upon the Alabama law which governed the trust and under which he claimed that the interests of the beneficiaries were classified as present interests. The Chief Justice said, however, that what is and what is not a future interest for purposes of the federal gift tax is not to be determined by state law. "As we have often had occasion to point out," he said, "the revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application. Hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law We find no such implication in the exclusion of gifts of 'future interests' from the benefits given by § 504 (b). In the absence of any statutory definition of the phrase we look to the purpose of the statute to ascer-

tain what is intended.”¹³⁰ In seeking the purpose of the statute to determine what it meant by a future interest, the Chief Justice found that Congress was not concerned with “varying local definitions of property interests or with the local refinements of conveyancing.”¹³¹ According to the committee reports accompanying the 1932 Act, “the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts.”¹³² In the instant case, said the Chief Justice, since the “use, possession, or enjoyment” of the beneficiaries was dependent upon the “happening of a future uncertain event”¹³³—their surviving the ten year period of accumulation—it would be difficult to determine “the number of eventual donees and the value of their respective gifts.”¹³⁴ Therefore, he concluded that the interests which they took were future interests within the meaning of that expression in the federal gift tax.

The Regulations define a future interest as any interest or estate “whether vested or contingent . . . limited to commence in use, possession or enjoyment at some future date or time.”¹³⁵ Although the Chief Justice in the *Pelzer* case approved of this definition insofar as it was “applicable to the present gifts,”¹³⁶ the definition suggested by the Chief Justice himself, to the extent that he undertook to suggest any definition, was considerably more limited than that of the Regulations. He said that the gifts in the *Pelzer* case were gifts of future interests because the “‘use, possession or enjoyment’ of each donee is thus postponed to the happening of a future *uncertain* event.”¹³⁷ There may be a considerable difference between a gift whose possession or enjoyment is postponed to “some future date or time” and one dependent upon the happening of a “future uncertain event.” If, for example, *A* transfers property to *B* in trust for *C* with directions to accumulate the income from the property for ten years, and then to pay the principal and accumulated income to *C*, or his estate, it may be said that this is a case where the possession or enjoyment of the property is deferred until a future time, although it is not dependent upon a future uncertain event. If, however, the terms of the trust were that *B* should accumulate income for ten years and then pay corpus and accumulated income to *C*, if *C* were living at that time, or to *D* if *C* were dead, *C*’s enjoy-

130. *Id.* at 402, 403.

131. *Id.* at 403.

132. H. R. REP. No. 708, 72d Cong., 1st Sess. (1932) 29; SEN. REP. No. 665, 72d Cong., 1st Sess. (1932) 41.

133. 312 U. S. 399, 404 (1941).

134. *Ibid.*

135. U. S. Treas. Reg., Art. 11 (1936).

136. 312 U. S. 399, 404 (1941).

137. *Ibid.*

ment of the property would clearly not only be postponed to a future date, but it would also be dependent upon the happening of a future uncertain event, *C's* outliving the ten year period. In other words, interests which are limited to commence in use, possession or enjoyment at some future date or time include gifts whose use, possession or enjoyment is dependent upon the happening of an uncertain future event. It is far from clear, however, that interests which are dependent upon some future uncertain event include all interests whose use, possession or enjoyment are limited to commence at some future time.

It may be significant in this connection that in the other case before the Court at the last term where it was called upon to define a future interest for purposes of the gift tax, it did so again in terms of a gift "upon a contingency which might never happen."¹³⁸ In this case, *Ryerson v. United States*,¹³⁹ a donor created a trust under which two of the trustees had the power by their joint action to terminate the trust and get the trust property. The question was whether the power of the trustees to terminate the trust and take the trust property amounted to gifts to them of present interests in the property. The Court held that it did not. Mr. Chief Justice Hughes, speaking again for a unanimous bench, said: "The gifts of a separate equal share of the corpus of the 1933 trust to each of the two trustees in the event of their joint request that the trust be terminated was a gift upon a contingency which might never happen. For the reasons stated in our opinion in the *Pelzer* case those gifts were of future interests within the meaning of § 504 (b) and consequently were not entitled to the benefit of the exclusion. While a present power of disposition for one's own benefit is the equivalent of ownership . . . here the joint power was not for the joint benefit of the donees of the power. Its exercise could only operate for the benefit of each to the extent of one-half of the trust property and then only in the event that both agreed to unite in its exercise."¹⁴⁰

Although in the *Ryerson* case the Chief Justice spoke of a future interest as one dependent upon a contingency which might never happen, it should also be noticed that he said that the interests involved in the case were future interests within the meaning of the Treasury Regulations because "in any case use and enjoyment of any part of the trust fund by either was postponed until such time as both joined in the exercise of the power."¹⁴¹ It is possible, of course, that the Court may be ready to affirm the Treasury definition to its fullest extent if

138. 312 U. S. 405, 408 (1941), cited note 140 *infra*.

139. 312 U. S. 405 (1941).

140. *Id.* at 408.

141. *Id.* at 408, 409.

occasion arises for it so to do. As far as the results, and to a considerable degree the reasoning, of the *Pelzer* and *Ryerson* cases are concerned, however, they do not go to this extent.

D. Processing Taxes

Two cases at the last Term dealt with processing taxes. One of them involved a point of procedure; the other, the construction of a contract. Under section 17 (a) of the Agricultural Adjustment Act provision was made for the refund of processing taxes to exporters. After the Agricultural Adjustment Act was declared unconstitutional in *United States v. Butler*,¹⁴² section 17 (a) was reenacted by section 601 (a) of the 1936 Act. It was also provided by section 601 (e) of the 1936 Act, however, that the decision of the Commissioner with respect to such refunds should be final and that "no court shall have jurisdiction to review such determination." In *Wilson & Co., Inc. v. United States*,¹⁴³ where three cases were disposed of by a single opinion, three exporters, to whom the Commissioner had denied refunds of processing taxes in connection with hog products which they had exported, sued for refunds in the Court of Claims. The Court of Claims held that under section 601 (e) it lacked jurisdiction to review the Commissioner's decision. In affirming the judgment of the Court of Claims, Mr. Justice Murphy, who spoke for a unanimous Court, said that section 601 (e) made the Commissioner's decision final and prevented judicial review. He added, however, that even if section 601 (e) should be construed to make the determination of the Commissioner final only with respect to "such matters as findings of fact, computations and the like,"¹⁴⁴ this would not help the petitioners since they had failed to show that their claims had not been denied on these grounds.

United States v. Cowden Manufacturing Co.,¹⁴⁵ the other processing tax case, really involved the construction of a contract and touched processing taxes only incidentally. In 1933 the United States agreed to purchase mechanics suits from the Cowden Manufacturing Company under a contract which stipulated that the purchase price should be increased by the amount of any "sales tax, processing tax, adjustment charge, or other taxes or charges . . . imposed or changed by the Congress after the date set for the opening of the bid upon which

¹⁴² 297 U. S. 1 (1936).

¹⁴³ 311 U. S. 104 (1940). The other cases disposed of by the same opinion were *Wilson & Co., Inc., of Kansas v. United States*, and *T. M. Sinclair & Co., Ltd. v. United States*.

¹⁴⁴ *Id.* at 106.

¹⁴⁵ 312 U. S. 34 (1941).

this contract is based and made directly applicable to the production, manufacture, or sale of the supplies covered by this contract and . . . paid by the contractor on the articles or supplies herein contracted for." In order to fulfill its undertaking with the United States, the Cowden Company contracted to purchase the cotton cloth, thread and labels needed to make the mechanics suits from subcontractors. At the time these subcontracts were made, there were no processing taxes in effect on the processing of cotton. In anticipation of such taxes, however, the Cowden Company agreed to reimburse its subcontractors for any processing taxes which they might be required to pay. Later, when the subcontractors did have to pay such taxes on the materials sold the Cowden Company, it reimbursed them for these expenditures. It then sought to recoup these sums from the United States and upon refusal of the United States to pay, sued in the Court of Claims. The Court of Claims ruled in favor of the company. The Supreme Court, however, unanimously reversed the judgment of the Court of Claims. Mr. Justice Murphy pointed out that the United States' agreement to pay processing taxes was limited to processing taxes on the supplies covered by its contract with the Cowden Company, which, he said, included only the mechanics suits, not the materials from which they were manufactured. Moreover, he declared that the United States had only stipulated to reimburse the Cowden Company for the processing taxes which it paid, which must be construed to mean the processing taxes imposed upon it and paid by it to the United States, not those imposed upon its subcontractors and paid by the contractor on their behalf.

II. STATE TAXES

A. *Jurisdiction to Tax*

Jurisdiction to tax is still being revised by the Supreme Court, with the usual catastrophic consequences to the taxpayer. At the turn of the last decade before the new political revelation, there was a strong tendency on the part of the Court to impose rigid restrictions upon state jurisdiction to tax. As the faithful gained ascendancy upon the supreme bench, however, the tide not only turned, but commenced to flow strongly in the opposite direction. The fetters so painstakingly forged ten years ago have been stricken off, and a new freedom has been achieved, which is rather disturbing even to those well conditioned to shocks from the new Court. Several cases at the last term bear eloquent testimony to the apparently unlimited capacity of the present Court to undo the work of its predecessors.

*Wisconsin v. J. C. Penney Co.*¹⁴⁶ is a fair sample of the Court's abilities in this direction. Wisconsin imposed a tax,¹⁴⁷ labelled by the Wisconsin legislature a "privilege dividend tax" and declared by that same assembly to be "for the privilege of declaring and receiving dividends," of two and one-half per cent. of all corporate dividends paid out of income derived from Wisconsin. The J. C. Penney Company was a Delaware corporation which earned part of its income in Wisconsin. The principal offices of the corporation were in New York. Its meetings were held there and income which it earned in other states was forwarded to New York and deposited in New York banks. The dividends declared by the corporation were voted at meetings held in New York and paid by checks drawn on New York banks. The Wisconsin Tax Commission assessed a dividend tax against the J. C. Penney Company upon part of its dividends proportionate to its Wisconsin income. The corporation, contending that the tax was unconstitutional, sued in the Wisconsin courts to have it set aside. The Supreme Court of Wisconsin held that the tax was unconstitutional. The Supreme Court of the United States, however, with four of the Justices dissenting, held that the statute was constitutional and reversed the judgment of the Wisconsin court. Mr. Justice Frankfurter delivered the opinion for the majority. He declared that the Wisconsin privilege dividend tax, in reality, was simply a tax upon corporate income derived from Wisconsin and was, therefore, clearly constitutional. The fact that both the Wisconsin legislature and the supreme court of that state had denominated the tax a tax on the privilege of declaring dividends did not disturb the Justice. "The descriptive pigeon-hole into which a state court puts a tax is of no moment," he said, "in determining the constitutional significance of the exaction. . . . The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation."¹⁴⁸

Mr. Justice Roberts, the Chief Justice, Mr. Justice McReynolds and Mr. Justice Reeds dissented. Mr. Justice Roberts said that he agreed with Mr. Justice Frankfurter that "in testing the constitutionality of an exaction this court examines for itself the nature and incidents of the tax and disregards mere names and descriptive epithets."¹⁴⁹ However, he said that the words used in a statute "necessarily have a conventional connotation. One cannot intelligently discuss things or actions except by using the names commonly employed to describe

146. 311 U. S. 435 (1940), (1941) 89 U. OF PA. L. REV. 830.

147. Laws of Wis. 1935, c. 505, § 3, as amended by Laws of Wis. 1935, c. 552.

148. 311 U. S. 435, 443, 444 (1940).

149. *Id.* at 447.

them.”¹⁵⁰ It was as far-fetched, said Mr. Justice Roberts, to call the tax in the instant case a tax on income as it would be to say that an *ad valorem* tax upon property purchased out of corporate earnings was a tax on income, “because the property represented income once received.”¹⁵¹ He concluded that the tax was really a tax upon the privilege of declaring dividends, and since everything connected with the declaration and payment of the dividends transpired outside of Wisconsin, it violated the due process clause of the Fourteenth Amendment.

It is difficult to dispute Mr. Justice Robert's conclusion that if the tax imposed by Wisconsin upon the privilege of declaring dividends was an income tax, then nearly any tax can be called an income tax. Mr. Justice Frankfurter himself in speaking of the Wisconsin tax system said, “In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out.”¹⁵² The concept of an income tax on outgo is somewhat startling. Later Mr. Justice Frankfurter apparently felt this seeming contradiction and tried to explain that the Wisconsin dividend tax was some sort of delayed income tax; that is, it was imposed on income, but it was not imposed until the income was paid out. The difficulty with this notion appears to be that the tax was only imposed with respect to income paid out in the form of dividends. Presumably, if it were paid out for the purpose of current expenses or capital improvements, or to reduce or pay interest on bonded indebtedness, no tax would be due. The critical element of the tax was, therefore, the payment of dividends rather than the receipt or disbursement of income. As Mr. Justice Roberts pointed out, if the tax was a tax upon income, it was a tax upon the income received by the stockholders of the corporation. Presumably even Mr. Justice Frankfurter would have had difficulty in justifying an income tax by Wisconsin levied against the nonresident stockholders of the corporation because of the dividends which they received from the corporation. If a tax is to be tested by its actual incidence rather than its legalistic label, however, it is difficult to deny that this was the practical effect of the Wisconsin exaction.

The constitutionality of the Wisconsin “income” tax on the “privilege of declaring and receiving dividends” was challenged again in *Wisconsin v. Minnesota Mining and Manufacturing Co.*¹⁵³ This time it was alleged that the tax violated not only the due process clause of the

150. *Ibid.*

151. *Id.* at 449, 450.

152. *Id.* at 442.

153. 311 U. S. 452 (1940).

Fourteenth Amendment but the commerce clause as well. Mr. Justice Frankfurter, again speaking for the majority of a sharply divided Court, upheld the constitutionality of the Wisconsin statute. Passing the due process point which was settled in favor of the tax by the *Penney* case, he said that the tax did not transgress the commerce clause since it was simply an income tax, and it is well settled that a state may tax the earnings of an interstate enterprise which are attributable to the taxing state. Once more the Chief Justice, Mr. Justice McReynolds, Mr. Justice Roberts and Mr. Justice Reed dissented.

Several interesting cases on jurisdiction to tax which were decided at the last term dealt with use taxes. To remove the temptation created by a state sales tax for residents of the taxing state to do their shopping abroad, many of the sales tax states have adopted use taxes. The use tax, which is, of course, simply a sales tax hiding behind a transparent legal fiction, is imposed at the rate of the sales tax upon the use of property within the taxing state which has escaped a sales tax. Although everyone, including the Supreme Court of the United States, is perfectly aware of the character of the use tax, its constitutionality as applied to goods purchased in interstate and extrastate sales has been fully sustained ¹⁵⁴ for the expressed legalistic reason that such a tax is not upon the sale but upon the local use of the property, and because of the unexpressed practical consideration that it is a necessary method of implementing a state sales tax.

With the winning of the contest over the constitutionality of the use tax the legal war over the tax now appears to have entered a second phase dealing with the methods of collecting and enforcing the tax. It is, of course, obvious that the most effective way of collecting a use tax, like a sales tax, is to force the seller to collect the tax. Not only are there more purchasers than sellers, but also the purchasers ordinarily do not keep records or have fixed places of business where it is easy to find them and check their transactions. Indeed, except in the case of very large purchasers, such as large scale contractors, or of special commodities like automobiles whose purchase can be checked through car registrations, it is practically impossible to collect use taxes from the user or purchaser. On the other hand, the difficulty with collecting a use tax from the seller is that he is usually outside the taxing state. Presumably, those who compete most intensely with the local retailer and whom it is most desirable to reach in this connection are the large mail order houses. If they could be forced to collect the use tax on goods which they sell to purchasers in the taxing state, the

¹⁵⁴ *Southern Pacific Co. v. Gallagher*, 306 U. S. 167 (1939); *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U. S. 182 (1939); *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937).

enforcement of the tax, while far from one hundred per cent. efficient, would at least appear sufficiently effective to warrant its existence. Several states have enacted legislation requiring mail order houses to collect use taxes upon sales to their citizens. Within limits which still await exact delineation, this is apparently constitutional.

Iowa, for example, has a use tax of 2 per cent.¹⁵⁵ which is a complement of its sales tax. The Iowa law provides that every "retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser. . . ." ¹⁵⁶ Sears, Roebuck & Co., a New York corporation, maintained retail outlets in Iowa. It also did a large mail order business in that state. The mail order business and the retail business in Iowa were kept separate. A customer in Iowa who wished to order by mail would write directly to the company's houses outside of the state; his order would be filled there and shipped directly to him by whatever method of transportation he chose to designate. The company collected sales taxes on the sales it made through its retail outlets in Iowa. It refused, however, to collect use taxes in connection with its mail order business. Because of this refusal the state tax commission threatened to revoke the company's license to do business in the state. The company retaliated with a suit to enjoin the forfeiture on the ground that the provision of the Iowa law requiring it to collect use taxes on its mail order business was unconstitutional. The Supreme Court of Iowa held that the tax was unconstitutional, since the state had no power to regulate the company's activities outside the state nor to make the regulation of such activities a condition to its continuing to do business in the state. The Supreme Court of the United States, with Mr. Justice Roberts and the Chief Justice dissenting and Mr. Justice Stone not participating in the decision, held that the Iowa law was constitutional.¹⁵⁷ Mr. Justice Douglas delivered the opinion of the majority. He first attacked the argument that Iowa had violated the due process clause of the Fourteenth Amendment by seeking to regulate matters outside the state. In this connection he said: "So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 and *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62. But respondent insists that those cases involved local activity by the foreign corpo-

155. IOWA CODE (1939) § 6943.102-6943.125.

156. *Id.* at § 6943.109.

157. *Nelson v. Sears Roebuck & Co.*, 312 U. S. 359 (1941).

ration as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power' Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. . . . Respondent cannot avoid that burden though its business is departmentalized." ¹⁵⁸

With regard to the argument that the Iowa tax discriminated against interstate commerce Mr. Justice Douglas replied that "Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where 'equality is its theme'." ¹⁵⁹ Mr. Justice Douglas also denied that the Iowa law constituted a regulation of and substantial burden upon interstate commerce because mail order houses which did not have retail outlets in Iowa were not required to collect use taxes upon their sales to Iowa customers. He declared that "those other concerns are not doing business in the state as foreign corporations" and therefore are "not receiving benefits from Iowa for which it has the power to exact a price." ¹⁶⁰ Finally, the Justice was not worried by the company's claim that it would not be able to collect the use tax upon its mail order business and would sustain heavy losses. "And so far as assumed losses on tax collections are concerned," he said, "respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or to claim a constitutional immunity because it elects to deliver the goods before the tax is paid." ¹⁶¹

The line of Mr. Justice Roberts' dissent, in which he was supported by the Chief Justice, is, of course, fairly obvious. As far as the Fourteenth Amendment was concerned, he felt that the Iowa law was unconstitutional because it attempted to lay a tax where there was no "local activity" within the state to sustain the tax. He also felt that the Iowa statute violated the commerce clause. "Clearly," he said, "in this instance the effort is directly and substantially to burden the transaction of an interstate business with the state's citizens, in violation of the commerce clause, by the threat of penalizing disobedience by the forfeiture of the right to transact, within Iowa, an independent business

¹⁵⁸ *Id.* at 364.

¹⁵⁹ *Id.* at 364, 365.

¹⁶⁰ *Id.* at 365.

¹⁶¹ *Id.* at 365, 366.

which the respondent conducts in accordance with all existing laws, including the law requiring it to deduct and pay over the amount of the Iowa sales tax. Upon reason as well as the unbroken current of authority in this court, Iowa has no such power to burden interstate commerce." ¹⁶²

From a practical point of view, the most serious objection to the Iowa statute is not that mail order houses like Sears Roebuck and Montgomery Ward ¹⁶³ which maintain local retail outlets in Iowa are required to collect use taxes on their mail order business, but that mail order houses which have no local establishments are not required to do so. This not only places Sears Roebuck and Montgomery Ward at a competitive disadvantage, but it also discriminates against the local Iowa merchant who is obliged to collect a sales tax. Apparently the Iowa statute did not undertake to impose an obligation on mail order businesses which had no outlets in Iowa to collect use taxes. Would a statute which does require this be constitutional? In this connection Mr. Justice Douglas said in *Nelson v. Sears Roebuck & Co.* that "The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power.'" ¹⁶⁴ It is not precisely clear what he meant by "impotence of state power." Conceivably, he may have meant that Iowa had jurisdiction, i. e., legal power to create such an obligation, but lacked any practical means of enforcing it. Conceding for the moment that this is what he did mean, the difficulty in enforcing such an obligation does not seem insuperable. True, since the mail order house upon whom the obligation rests is not qualified to do business in Iowa, Iowa could not forfeit its license to do business there. If, however, the full faith and credit clause applies to tax obligations, as it seems that it should, ¹⁶⁵ Iowa could sue the seller in its home state. Moreover, even though it should be held that tax obligations are not entitled to full faith and credit, this would not prevent the home state from entertaining such a suit as a matter of comity. This is required by statute in North Carolina. ¹⁶⁶ Conceivably a court might entertain such an action on its own initiative without any statute.

Of course, when Mr. Justice Douglas spoke of the "impotence of state power" to require a mail order house which lacks local outlets in

^{162.} *Id.* at 370.

^{163.} *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373 (1941), raised the same problem and reached the same conclusion as *Nelson v. Sears Roebuck & Co.*, 312 U. S. 359 (1941), cited note 157 *supra*. The Chief Justice and Mr. Justice Roberts also dissented in the *Montgomery Ward* case, while Mr. Justice Stone did not participate in the decision.

^{164.} 312 U. S. 359, 364 (1941).

^{165.} *Cf. Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935).

^{166.} N. C. CODE (1939) §§ 7880 (194)a, (194)b.

Iowa to collect use taxes on sales to purchasers in Iowa, he may have meant that Iowa lacked jurisdiction or legal power to create such an obligation. This would follow if the legal basis for requiring nonresident sellers to collect use taxes rests exclusively upon the fact that this is part of the price which Iowa may exact for the privilege of doing a local business there. It would appear to be legally conceivable, however, that the fact that a mail order house makes sales to residents of Iowa is sufficient in itself to justify Iowa in requiring it to collect use taxes on such sales. It is true that these sales constitute interstate commerce, but the tax imposed upon the seller with respect to such commerce is clearly nondiscriminatory. It might, therefore, be held to escape any obstacles on the score of either due process or the commerce clause.

This much is clear: practical considerations rather than legal doctrines have so far dictated the results in the use tax cases. The results are too unorthodox to have been dictated by traditional legal logic. The controlling consideration which first led the Supreme Court to sustain the use tax, and to take the further step of upholding the method of collection exemplified in the *Sears Roebuck* and *Montgomery Ward* cases, was the desire to prevent discrimination against local retailers. If the Court stops here it will leave a bad gap in the enforcement of use taxes. Moreover, the *Sears Roebuck* and *Montgomery Ward* cases will have created a new kind of discrimination. If mail order houses which lack local outlets are not obliged to collect use taxes, this discriminates not only against the local retailer, but also against other mail order houses. Any intimation in Mr. Justice Douglas' opinion in the *Sears Roebuck* case that use taxes cannot be collected from mail order houses which have no local retail outlets was, of course, entirely dictum. The problem was not before the Court. If it comes squarely before the Court, it is certainly possible, and perhaps probable, that the Court as it is presently constituted will find methods of making mail order houses which have no local outlets bear their fair share of the use tax burden.

There are two ways in which jurisdiction to tax can be extended. One is by boldly denying the conventional limitations on state power, as the Court did, for example, in the *Sears Roebuck* and *Montgomery Ward* cases. Another is by construing the tax in question in such a way as to bring it within the admitted limits of the state's jurisdiction to tax. This is what the Court did in an extreme form in *Wisconsin v. J. C. Penney Co.*¹⁶⁷ In another case decided earlier at the last term it did the same thing in a milder fashion. In *Continental Assurance*

167. 311 U. S. 435 (1940), cited note 146 *supra*.

Co. v. Tennessee,¹⁶⁸ Tennessee imposed a privilege tax¹⁶⁹ upon the Continental Insurance Company, which was measured by premiums on policies which it had issued while it was doing business in that state. The company contended that since it had withdrawn from Tennessee and ceased to do business there and since the premiums by which the tax was measured were mailed to its office outside the state, the tax was unconstitutional. The Supreme Court in a *per curiam* opinion held, however, that the tax was valid, since, according to the state court's construction of the law, it was not a tax upon the privilege of doing business in the state but a tax on the privilege of coming into the state to do business. In other words, once the company exercised the privilege of coming into the state to do business, it was bound to pay a tax on the premiums of any policies written in the state, even after it ceased doing business there. *Provident Savings Life Assurance Society v. Kentucky*¹⁷⁰ was distinguished upon this ground.

One of the most interesting cases on jurisdiction to tax to come before the Supreme Court at the last term was *Stewart v. Pennsylvania*.¹⁷¹ Although the question involved was one of considerable importance, and sufficiently controversial to lead the Chief Justice, Mr. Justice McReynolds and Mr. Justice Roberts to note their dissent, the Court disposed of it by a memorandum affirmance without any formal opinion.

In the *Stewart* case, a resident of New York transferred stocks and bonds to a New York trust company and to two individual residents of that state in trust for her daughter, a resident of Pennsylvania, during the daughter's life. Upon the death of the daughter there were gifts over to the daughter's children and issue of her deceased children, or failing such issue, to the other children of the grantor and their issue. The securities held in trust were registered in the name of the New York trustees and kept in New York. The problem in the case was whether the interest of the daughter was subject to a Pennsylvania property tax. The Supreme Court of Pennsylvania held that, properly construed, the Pennsylvania tax applied to the daughter's interest and that this did not violate the uniformity provision of the Pennsylvania constitution. The bulk of the Pennsylvania court's opinion was, however, devoted to the only question properly before the Supreme Court of the United States, whether or not the Pennsylvania tax violated the due process clause of the Fourteenth Amendment. Justice Stern who delivered the majority opinion held that it did not. After noticing the

168. 311 U. S. 5 (1940).

169. TENN. CODE (1932) §§ 6118, 6120, 6122.

170. 239 U. S. 103 (1915).

171. 338 Pa. 9, 12 A. (2d) 444 (1940), *aff'd*, 312 U. S. 649 (1941).

academic controversy over whether the beneficiary of a trust has a right *in rem* to the trust property or merely a right *in personam* against the trustee, he said that the decisions of the courts clearly sustain the *in rem* theory and that the beneficiary of a trust really is the owner of an estate in the trust property. The mere fact, he added, that the beneficiary in this case had only a life estate would go to the *quantum* of her estate, rather than to its existence. Having established to his satisfaction that the beneficiary had an estate in the trust property which could be reached by a property tax, Justice Stern proceeded to consider the problem of where this could be taxed. He decided that Pennsylvania had jurisdiction to tax it, because this was the domicile of the owner, and the owner's domicile has jurisdiction to tax intangibles. The fact that the property might also be taxed by New York did not disturb Justice Stern, because he found that nothing in the Fourteenth Amendment forbids double taxation of intangibles. "Any remaining doubt," he added, "as to whether the Fourteenth Amendment prohibits two states from both taxing ownership interests of their respective residents in the same intangibles has been dispelled by the recent cases of *Curry v. McCanless*, 307 U. S. 357, and *Graves v. Elliott*, 307 U. S. 383."¹⁷² Justice Stern was clearly sound in this conclusion, because these two cases were cited by the Supreme Court in its abbreviated affirmance of the *Stewart* case. Although both of these decisions involved death taxes, apparently they are equally applicable to the property tax involved in the *Stewart* case.

Justice Stern was forced to distinguish several cases in order to reach his conclusion. The way in which he did this was rather interesting. He explained *Brooke v. Norfolk*,¹⁷³ where the Supreme Court held that a Virginia tax upon the interest of a Virginia life beneficiary in a Maryland trust was unconstitutional, upon the ground that the fatal defect in the Virginia statute was not that it attempted to tax the Virginia beneficiary, but that it attempted to tax her as if she owned the entire corpus of the trust. *Safe Deposit & Trust Co. of Baltimore v. Virginia*,¹⁷⁴ which was the first of the series of cases in which the Supreme Court undertook to outlaw multiple taxation of intangibles, and which held that Virginia had violated due process in attempting to impose a property tax upon the interests of resident beneficiaries in a Maryland trust, was distinguished on the basis of Mr. Justice Stone's concurring opinion. Mr. Justice Stone, who has never felt that the Fourteenth Amendment forbids double taxation of intangibles, concurred in the result of the *Safe Deposit and Trust Company* case on

172. *Id.* at 21, 12 A. (2d) at 450.

173. 277 U. S. 27 (1928).

174. 280 U. S. 83 (1929).

the ground that the Virginia statute attempted to tax the securities held in trust rather than the equitable interests of the Virginia beneficiaries in the trust. *Mayor and City Council of Baltimore v. Gibbs*,¹⁷⁵ a Maryland case which held that the life interest of a Maryland beneficiary in a Pennsylvania trust could not be taxed in Maryland, and in which the Supreme Court refused certiorari, was disposed of because it "was based upon the assumption, later definitely repudiated . . . by the Supreme Court of the United States, that the 'double taxation' of intangibles is unconstitutional."¹⁷⁶ *Senior v. Braden*,¹⁷⁷ where an Ohio tax upon a resident beneficiary of a trust of foreign real estate was held unconstitutional, was distinguished upon the ground that the basis of that decision was that the beneficiary was regarded as the owner of an interest in foreign realty, rather than the owner of intangible personalty.

Even in the days when the Supreme Court was struggling to eliminate multiple taxation of property and inheritance, it manifested a marked reluctance to interfere with the state's power to tax income. It is not surprising then to find the present Court reaffirming the doctrine that a state may tax all of the income of its residents, regardless of the source of that income. Nevertheless the decision in which this statement appeared was a rather surprising case. Some years ago Arkansas ceded territory at Hot Springs to the federal government for a federal reservation. In connection with this cession it was provided by a Congressional Act of 1891¹⁷⁸ and reiterated in an Arkansas Act of 1903¹⁷⁹ that "the consent of the United States is hereby given for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property of all structures and other property in private ownership on the Hot Springs Reservation." The Superior Bath House Company is an Arkansas corporation which operates a bath house on the reservation at Hot Springs. In *Superior Bath House Co. v. McCarroll*¹⁸⁰ the question arose whether the income from this enterprise was subject to the Arkansas income tax. The Supreme Court held that it was. Mr. Justice Black, who delivered the opinion of the Court, said that since the state put its case for the tax on the ground that the tax was permitted by the federal and state legislation in 1891 and 1903, he would consider it on this basis. The Bath House Company contended that the legislation in question simply authorized an *ad valorem* tax on tangible property. Mr. Justice Black, however, found that this con-

175. 166 Md. 364, 171 Atl. 37 (1934), *cert. denied*, 293 U. S. 559 (1934).

176. 338 Pa. 9, 23, 12 A. (2d) 444, 451 (1940).

177. 295 U. S. 422 (1935).

178. 26 STAT. 844 (1891), 16 U. S. C. A. § 365 (1941).

179. Ark. Acts 1903, No. 30.

180. 312 U. S. 176 (1941).

struction was too narrow. He said that the purpose of the Congressional consent was to broaden rather than restrict the state's taxing power. Under the Arkansas law at this time, structures attached to land were considered part of the land. Congress by declaring that they could be taxed as personal property simply intended to allow the taxation of structures erected upon tax-exempt land. Congress did not use the terms *ad valorem*, or tangible property, and it had no intention to restrict the state to *ad valorem* taxes on tangible property or to the system of taxation in force at the time the Congressional consent was given. He concluded that the Arkansas income tax was within the scope of the Congressional permission. Mr. Justice Stone wrote a concurring opinion. He said that he had difficulty in finding consent to an income tax in the words of the Act of Congress authorizing the state to tax "all structures and other property in private ownership on the . . . reservation." It was not, however, necessary to consider this question, because a state has power to tax the income of a domestic corporation regardless of its source. Since Arkansas by reserving the right to lay a property tax in the reservation had not renounced the power to tax the income of its corporations, and Congress had not forbidden such a tax, Mr. Justice Stone concluded that the Arkansas tax was valid.

Mr. Justice Roberts concurred in the concurring opinion of Mr. Justice Stone. Mr. Justice Frankfurter concurred with both Mr. Justice Black and Mr. Justice Stone.

B. *Interstate and Foreign Commerce*

The commerce clause is an outstanding example of an old constitutional bottleneck which is rapidly expanding with the infusion of new wine. Although theoretically the states still cannot tax interstate commerce or unduly burden or discriminate against it, it is becoming increasingly difficult to convince the Supreme Court in a concrete case that a tax offends the commerce clause. This was, of course, illustrated by the use tax cases, which have been noted in connection with jurisdiction to tax.¹⁸¹ It was also apparent from the other commerce cases decided by the Court at the last term. In but one of these cases could the Court be prevailed upon to hold a state tax invalid.

*Best & Company v. Maxwell*¹⁸² involved the constitutionality of a North Carolina statute¹⁸³ which required every person who was not a regular retail merchant in the state and who displayed samples or

181. Pp. 171-175 *supra*.

182. 311 U. S. 454 (1940), (1941) 89 U. OF PA. L. REV. 831.

183. N. C. Laws 1937, c. 127, § 121 (e).

merchandise in a place temporarily rented or occupied for that purpose, with the object of securing orders for the retail sale of such goods, to pay a license tax of \$250. Best & Company, a New York retail merchandise establishment, rented a display room for several days in a North Carolina hotel where it took orders for goods corresponding to the samples displayed. These orders were filled by shipping the goods directly from New York to the purchasers. It paid the North Carolina tax under protest and later sued in a North Carolina court for a refund. The trial court, holding the statute unconstitutional, granted the refund. The North Carolina Supreme Court, however, upholding the constitutionality of the tax, reversed the trial court. Upon appeal to the Supreme Court of the United States that tribunal reversed the state supreme court and held that the statute was bad. Mr. Justice Reed, speaking for a unanimous bench, said that the North Carolina law tested by its "actual effect" rather than by the "ostensible reach of the language"¹⁸⁴ clearly discriminated against interstate commerce. He pointed out that although, as far as the wording of the statute was concerned, it applied with equal force to both residents and nonresidents renting display rooms to sell by sample, the practical effect of the law was clearly calculated to discriminate against nonresidents, since the great bulk of resident sellers would either be regular retail merchants in the state or the agents of such merchants. From the viewpoint of the practical operation of the statute, it was designed to affect only non-resident sellers who had no place of business in the state. They would be forced either to suffer prohibitive expense of establishing places of business in the state, or to pay the \$250 license tax. On the other hand their competitors, the regular retail merchants in the state, were not subject to the license tax of \$250, but only to a \$1 tax for the privilege of doing business.

The practical operation of a statute, as distinguished from the ostensible reach of the statutory language, may reveal, as it did in *Best & Company v. Maxwell*, a discrimination against interstate commerce. On the other hand, it may show that there is no such discrimination. Thus in *Caskey Baking Co. v. Virginia*,¹⁸⁵ a Virginia statute, which somewhat resembled the North Carolina law in the *Best* case, was held to be constitutional. The *Caskey* case involved the constitutionality of a Virginia license tax of \$100 for every vehicle used to "peddle goods, wares and merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller."¹⁸⁶ It was further provided that

184. 311 U. S. 454, 457 (1940).

185. 313 U. S. 117 (1941).

186. VA. TAX CODE (Michie, 1936) § 192 (b).

the tax should not apply to manufacturers taxable upon capital by Virginia, distributors of manufactured goods paying a state license tax on their purchases, or wholesale dealers regularly licensed by Virginia and selling and delivering merchandise to retail merchants.¹⁸⁷ The Caskey Baking Company was a West Virginia corporation whose office and principal place of business was in Martinsburg in that state. It made bread in West Virginia which it delivered by its trucks to grocers and other retailers in Virginia. The drivers of the trucks called upon the regular customers of the Company in Virginia and after inquiring how much bread they needed, would take that amount from their trucks and deliver it to them. The company had no property permanently located in Virginia and no place of business there, except an office which it was required to maintain by the Virginia law relating to registered foreign corporations, for the settlement of claims against it. The company, being registered in Virginia as a foreign corporation, paid an annual registration fee and a Virginia income tax upon income derived from that state. It refused, however, to pay the \$100 license tax for each of its trucks which operated in Virginia, on the ground that this was unconstitutional under the commerce clause. After being indicted and convicted in the state courts for peddling without a license, the company appealed to the Supreme Court of the United States. Mr. Justice Roberts, speaking for a unanimous bench, upheld the conviction and ruled that the statute was constitutional. He pointed out that the statute was not a burden upon interstate commerce because "while the transportation of bread across the state line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the Act hits, and this irrespective of the source of the goods sold."¹⁸⁸ He then went on to explain that the tax did not discriminate against interstate commerce. Although, because of the exceptions in the licensing statute, those in the situation of the Caskey Company were about the only wholesale peddlers required to pay the tax, there was no discrimination against them; for other persons who were not taxed under the licensing statute paid taxes to which the company was not subject under other provisions of the Virginia tax system. In other words, unlike the case last discussed, here the ostensible reach of the language of the taxing act appeared to discriminate against the appellants. When, however, the practical operation of the Virginia tax system was examined, it was found that there was no discrimination in fact. Mr. Justice Roberts also added that the appellants could not complain because peddlers at wholesale were not licensed and taxed as other

¹⁸⁷. *Ibid.*

¹⁸⁸. 313 U. S. 117, 119 (1941).

vendors. "The equal protection clause of the Fourteenth Amendment," he said, "does not prevent a state from classifying businesses for taxation or impose any iron rule of equality. Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. It is enough that those in the same class are treated with equality. That is true here."¹⁸⁹

There was another case at the last term involving a licensing statute. Although it was not a revenue measure it comes sufficiently close to the problem of taxing interstate commerce to merit comment. A California statute¹⁹⁰ defines a transportation agent as one who "sells or offers for sale, or negotiates for" transportation over the public highways of the state, and it requires such persons to procure a license from the State Railroad Commission. In order to obtain the license the applicant must convince the Commission of his fitness to exercise the licensed privilege, pay a fee of \$1, and file a bond of \$1,000 conditioned upon the faithful performance of the contracts he negotiates. In *California v. Thompson*,¹⁹¹ Thompson had arranged for the transportation of passengers by motor vehicle from Los Angeles, California, to Dallas, Texas, without first obtaining a license to act as a transportation agent. He was convicted of violating the licensing act. This conviction was reversed, however, by an appellate court in California on the ground that the licensing statute violated the commerce clause. The Supreme Court of the United States, unanimously reversing the judgment of the state court, held that the statute was constitutional. Mr. Justice Stone, who wrote the opinion, pointed out that the regulation by the state, although it affected interstate commerce, dealt with a matter of local concern where the states have power to regulate in the absence of Congressional action. He was, of course, confronted with *Di Santo v. Pennsylvania*,¹⁹² upon the basis of which the California court had held the statute unconstitutional. In this case the Supreme Court held that a Pennsylvania statute requiring a license of persons, other than railroads and steamship companies, engaged in selling steamship tickets or orders for transportation to and from foreign countries, was an unconstitutional burden on foreign commerce. Candidly admitting that the decision in that case was opposed to his conclusion in the *Thompson* case, Mr. Justice Stone overruled it.

The Indiana Gross Income Tax Law¹⁹³ came before the Supreme Court twice at the last term. On both occasions it was found to be

189. *Id.* at 121.

190. STATS. CAL. 1933, c. 390, §§ 6, 7, 8, 16, as amended STATS. CAL. 1935, c. 665, §§ 2, 7.

191. 313 U. S. 109 (1941).

192. 273 U. S. 34 (1927).

193. IND. STAT. ANN. (Baldwin, 1934) § 15982.

constitutional. *Department of Treasury v. Ingram-Richardson Mfg. Co.*,¹⁹⁴ involved an Indiana corporation which had a factory at Frankfort, Indiana, where it manufactured enamel. Part of its business consisted of enameling stove and refrigerator parts for manufacturers of these commodities in other states. Orders for this work were solicited by the taxpayer's agents in the other states, and when the orders were accepted it would pick up the parts in its trucks, bring them to the factory in Indiana for enameling, and then return the finished parts in its own trucks to the stove or refrigerator manufacturers. The taxpayer billed its customers for this work by mail, and remittances were made to it by mail. The taxpayer contended that its income from this branch of its business was not subject to the Indiana gross income tax because these transactions constituted sales of the finished enamel in interstate commerce; and, in the alternative, because the services from which the income was derived included the solicitation of orders by its agents, the execution of contracts in other states, interstate communications by mail, telephone and telegraph, and the interstate transportation of the stove and refrigerator parts. The Supreme Court held, however, that the respondent's income was not derived from the sale of finished enamel, but from its services in enameling the stove and refrigerator parts. Moreover, said Chief Justice Hughes, speaking for the unanimous Court, "The enameling process was an activity performed at respondent's plant in Indiana and the gross receipts therefrom were taxable by Indiana under its Gross Income Tax Law. . . . The fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside Indiana did not make the enameling process other than an intrastate activity and any the less a proper subject for the application of the taxing statute."¹⁹⁵

The Chief Justice was somewhat bothered by the taxpayer's contention that it was being taxed upon income received from transporting the stove and refrigerator parts across state lines. After declaring that the income from this service was taxable because "the entire service was in aid of the enameling business conducted within the state,"¹⁹⁶ the Chief Justice seemed to feel that he might have gone too far and added: "Moreover, if the transportation of the metal parts were regarded as an item of service for which a deduction should have been allowed, we think that it was the duty of respondent, in view of the fact that it was conducting an intrastate business clearly subject to the tax, to claim the deduction and show the amount which should be allowed. It does not appear that respondent did either. Respondent made its

194. 313 U. S. 252 (1941).

195. *Id.* at 254.

196. *Id.* at 255.

claim for a total exemption from the tax upon the ground that it was laid upon interstate sales, a contention which it failed to support."¹⁹⁷

*Department of Treasury v. Wood Preserving Corporation*¹⁹⁸ also involved the constitutionality of the Indiana gross income tax. The Wood Preserving Corporation, a Delaware corporation, with its principal place of business in Pittsburgh, Pennsylvania, was engaged in creosoting and buying and selling railroad ties. It sold no ties, however, except to those with whom it had contracts for creosoting. That part of the corporation's business out of which the controversy under the Indiana gross income tax arose consisted of selling raw ties to the Baltimore & Ohio Railroad in Indiana. The Wood Company had several contracts with the Baltimore & Ohio Railroad under which the railroad was to deliver ties to be creosoted at its factories in Ohio and West Virginia and by the terms of which the company was to sell the railroad raw ties. Under these contracts the railroad would issue requisitions for ties from its office in Baltimore, Maryland, to the Wood Company, which would accept these orders at its office in Marietta, Ohio, by telephone or mail. Then the Wood Company would procure raw ties from sellers in Indiana by telephone or mail from its Marietta office. These ties would be delivered to the railroad at designated loading points in Indiana. When the ties were ready, the Wood Company's agent and an inspector for the railroad would meet at these points, and if they were accepted by the railroad's inspector, they would be loaded on the freight cars by the railroad company and transported for creosoting to the Wood Company's factory in Ohio under bills of lading in which the Wood Company was named as consignor and one of its employees at the creosoting plant as consignee. The Wood Company mailed weekly invoices from its office in Marietta to the railroad company at its Baltimore office for the ties sold and delivered to the railroad. Monthly reports of such invoices were made to the Wood Company's main office in Pittsburgh. Payments for the ties were made at the Wood Company's Pittsburgh office and deposited in a bank there. Indiana under its Gross Income Tax Law undertook to tax the receipts which the Wood Company derived from the sale of the untreated ties in Indiana. After paying the taxes, the company sued in a district court for refunds, contending that as applied to it the Indiana law was unconstitutional. The District Court denied recovery. The Circuit Court of Appeals, however, reversed the District Court's judgment on several grounds. First, the Circuit Court of Appeals said that Indiana had no jurisdiction to tax the income in question, since the Indiana

197. *Ibid.*

198. 313 U. S. 62 (1941).

tax was laid upon the "receipt of gross income" and the income in this case was received in Pennsylvania. Moreover, it held that the tax was bad because no method was provided for allocating the income derived from the business within Indiana; and finally that, the transactions in question being in interstate commerce, the Indiana tax discriminated against such commerce. The Supreme Court reversed the judgment of the Circuit Court of Appeals, declaring that none of these objections were valid. Chief Justice Hughes, speaking again for a unanimous Court, pointed out that the tax was not upon the receipt of income, but upon income derived from sources within the state. Consequently, if the Wood Company derived its income from intrastate activities within Indiana, the tax was clearly constitutional regardless of where the income was received. Turning then to the nature of the sales in question, the Chief Justice found that they were local sales in Indiana, since the sales were completed when the ties were accepted by the railroad's inspector at the loading points in that state. The Chief Justice also pointed out that no question of apportionment was involved in the case, since the only thing that Indiana had undertaken to tax was the receipts from the sales in Indiana, not the income from the creosoting business. Moreover, he added that the fact that the ties sold in Indiana were purchased "through orders given to the Indiana producers from respondent's Marietta office cannot affect the authority of Indiana to tax the receipts from intrastate activities of respondent in its dealings with the Railroad Company."¹⁹⁹

The last of the commerce cases, *West India Oil Co. v. Domenech*,²⁰⁰ involved the validity of a Puerto Rican sales tax²⁰¹ upon sales of fuel oil, which had been imported in bond into Puerto Rico, withdrawn duty free, and delivered to vessels in Puerto Rican ports for use as fuel upon their voyages to ports in the United States and foreign countries. Since Congress had provided that such oil should be free from customs duties,²⁰² the question arose whether this immunized these sales from the Puerto Rican tax. The majority of the Court felt that it did not. Mr. Justice Stone, in delivering the opinion of the Court, distinguished *McGoldrick v. Gulf Oil Corporation*,²⁰³ where a New York City tax upon similar sales was held to be invalid, upon the ground that Congress had consented to the Puerto Rican tax by an

199. *Id.* at 67. *Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938) was distinguished on the ground that "the tax was there laid upon receipts from sales to customers in other states and abroad which constituted interstate and foreign commerce." *Id.* at 66.

200. 311 U. S. 20 (1940).

201. Internal Revenue Law of Porto Rico, Laws of 1925, §§ 16, 62, as amended by Act No. 17, Laws of 1927, p. 458.

202. Tariff Act of 1930, § 309, 46 STAT. 590, 690; REVENUE ACT OF 1932, §§ 601 (b), 630, 47 STAT. 259, as amended June 16, 1933, 48 STAT. 256.

203. 309 U. S. 414 (1940).

amendment to the Organic Act of Puerto Rico under which it was provided "that the internal revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares or merchandise may be levied and collected as such legislature may direct, on the articles subject to such tax, as soon as the same are manufactured, sold, used or brought into the island."²⁰⁴

Mr. Justice Reed dissented from the view expressed by Mr. Justice Stone. He thought that the Puerto Rican tax was governed by the *McGoldrick* case. The amendment to the organic act did not, according to Mr. Justice Reed, authorize a tax upon the sales of duty free oil, but was simply designed to eliminate the original package doctrine, and to allow Puerto Rico to tax goods imported into the island irrespective of whether or not they were in the original containers. He felt that allowing Puerto Rico to tax sales of duty free fuel oil would frustrate the intention which Congress had in providing for duty free withdrawals of such oil, namely, of allowing domestic sellers to compete with foreign vendors in supplying fuel oil to ships. Mr. Justice Roberts concurred in Justice Reed's dissent.

C. Federal Immunity

In recent years the doctrine of intergovernmental immunities has received such rough treatment at the hands of the Supreme Court that it is difficult to tell what, if anything, remains of it. It is clear, however, that a state cannot tax property owned by the United States; and in *United States v. Alabama*,²⁰⁵ the Court declared that a state tax lien, which attached to property before it was acquired by the United States, could not be enforced against the United States, nor against the property itself, while it was in the hands of the United States. Such a lien is, however, apparently unenforceable, rather than void. It cannot be removed as a cloud on title, and it would appear that it might be enforced against a grantee of the United States.

The tax laws of Alabama provide that "From and after the first day of October, when property becomes assessable the State shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him . . . which lien shall continue until such taxes are paid."²⁰⁶ Counties in Alabama are given like liens for taxes assessed by them. Three tracts of Alabama land were granted to the Federal Government. One of these was granted on October 1, 1936; one on December 10,

204. Section 3 of the Organic Act, as amended March 4, 1927, 44 STAT. 1418 (1927), 48 U. S. C. A. §§ 741, 741a, 745 (Supp. 1940).

205. 313 U. S. 274 (1941).

206. ALA. CODE ANN. (Michie, 1928) § 8874.

1936; and one on March 10, 1937. All three tracts were listed for 1937 taxes by the grantors, although they failed to pay the taxes whose amount was not definitely determined and assessed until after the title had passed to the United States. The state of Alabama had the lands sold for delinquent taxes, becoming the purchaser at these sales. In *United States v. Alabama* the United States brought this suit to quiet its title to the lands, to have the state and county tax liens and the tax sales to the state declared void, and the state enjoined from pressing its claims. When the case reached the Supreme Court, Chief Justice Hughes, delivering the opinion of a unanimous bench, held that the United States was entitled to have the tax sales and the certificates of purchase set aside, but that it was not entitled to further relief. The Chief Justice pointed out that the tax liens against the land accrued before it was conveyed to the United States and were, therefore, valid. Even though there were valid liens against the land, however, they could not be enforced while it was owned by the United States and, therefore, the tax sales were void. However, although the United States was protected against the assertion of the liens while it held title to the property in question, the liens were merely unenforceable, and therefore it was not entitled to a decree cancelling the liens as a cloud upon its title.

D. *Obligation of Contracts*

The Supreme Court held two state statutes relating to taxation unconstitutional at the last term. One was the North Carolina license tax involved in *Best & Company v. Maxwell*.²⁰⁷ The other was an Arkansas statute²⁰⁸ which attempted to repeal an Arkansas law²⁰⁹ providing that tax sales should not be set aside because of technical irregularities. In 1935 Arkansas passed a statute providing that a tax sale should not be set aside because of technical irregularities in connection with the levy and assessment of the taxes and the sale of the property. In 1936, while this statute was in force, the defendants purchased land, which had been sold to the state in 1933 for failure to pay 1932 taxes, from the Commissioner of State lands, who gave the defendants a quitclaim deed to the land. In 1937, the Arkansas legislature having repealed the 1935 Act, suit was instituted by a grantee of the corporation which owned the land when it was sold in 1933, to set aside the sale to the defendants. It was conceded that irregularities existed in

207. 311 U. S. 454 (1940), pp. 179-180 *supra*. Although the Supreme Court held two laws relating to taxation unconstitutional at the last term, it held but one *tax* unconstitutional. This was the statute involved in *Best & Co. v. Maxwell*.

208. Ark. Acts 1937, No. 264.

209. Ark. Acts 1935, No. 142.

connection with this sale which would justify its being set aside were it not for the 1935 Act. In *Wood v. Lovett*²¹⁰ the majority of the Court, speaking through Mr. Justice Roberts, held that the sale could not be set aside. Mr. Justice Roberts declared that the sale to the defendants when the 1935 Act was in force was an offer on the part of the state to the defendants that they would have a title which could not be set aside because of technical defects, if they would purchase the land. By purchasing the land the defendants accepted this offer and entered into a contract with the state, and the act of the legislature in attempting to repeal the 1935 Act was an unconstitutional attempt to impair the obligation of this contract.

Mr. Justice Black did not believe that there was any impairment of a contract in the *Wood* case. He declared that the 1935 and 1937 Acts simply represented attempts on the part of the Arkansas legislature to deal with the problem of delinquent property taxes, and the contracts clause of the federal constitution properly construed did not prevent state experimentation in this direction. Mr. Justice Murphy and Mr. Justice Douglas joined Mr. Justice Black in his dissent.²¹¹

210. 313 U. S. 362 (1941).

211. There were five other cases decided by the Supreme Court at the 1940 Term which have some bearing on taxation. Four of these were bankruptcy cases. The fifth involved federal procedure. *City of New York v. Feiring*, 313 U. S. 283 (1941), 90 U. of PA. L. REV. 101, held that the liability imposed upon vendors to collect the New York City sales tax was a tax entitled to priority under § 64 of the National Bankruptcy Act. In *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132 (1941), it was held that a bankruptcy court, which had jurisdiction over the reorganization of the Missouri Pacific Railroad, could not revise a property tax assessment of the railroad's property by the Arkansas Corporation Commission under § 64 (a) (4) of the National Bankruptcy Act. *Philadelphia Co. v. Dipple*, 312 U. S. 168 (1941), and *Palmer v. Webster & Atlas National Bank*, 312 U. S. 156 (1941), were both reorganization cases where the corporations being reorganized had leased properties from certain other corporations under agreements to pay the lessor corporation's taxes. The question in both cases was whether the debtors were required to pay the taxes of the lessors. The Supreme Court held that, under the circumstances disclosed in the cases, they were not. *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621 (1941) involved the jurisdiction of a three judge federal court. After seventy-six individuals, partnerships and corporations had sought unsuccessfully to have a three judge federal court declare certain provisions of the Missouri Bus and Truck Law unconstitutional, the state officers, who had been named as defendants in the original suit, filed a motion before the same court to have it assess damages and costs they claimed to have sustained in the action. The three judge court dismissed the motion upon the ground that the point involved had already been passed upon in the earlier denial of a counterclaim. The Circuit Court of Appeals affirmed the judgment of the District Court upon the ground that it had not abused its discretion in refusing to assess damages. The Supreme Court in reversing the judgment of the Circuit Court of Appeals said that the question of damages was not a proper one for the three judge court, which was limited to passing upon the constitutionality of the state law. The judgment of the District Court was, however, reviewable and was not invalidated by the fact that three judges had undertaken the work of one. Moreover, the Supreme Court said this was a case where damages should be assessed by a single district judge since the point had not been previously passed upon in denying the counterclaim and because due to the large number of plaintiffs, the refusal to do so would lead to multiplicity of actions. The final judgment of the Supreme Court was that the judgment of the Circuit Court of Appeals should be reversed and the case remanded for further proceedings before a single district judge.

CONCLUSION

So many astounding things have been done to, and by, the Supreme Court in the past few years that nearly anything which happens now is bound to seem anticlimactic. Transposed to the pre-Roosevelt era, the tax cases decided by the Court at the last term are starkly incredible. Viewed against the more immediate background of contemporary legal history, they become the veriest commonplaces.

Consider, for example, jurisdiction to tax. At the last term the Supreme Court flatly repudiated the carefully constructed safeguards against multiple taxation of intangibles. But this happened two years ago.²¹² *Stewart v. Pennsylvania*,²¹³ which would have been a judicial earthquake a decade ago, was passed over at the 1940 term without even the formal acknowledgment of an opinion.

The *Sears Roebuck*²¹⁴ and *Montgomery Ward*²¹⁵ cases, which held that a mail order house may constitutionally be compelled to collect a use tax on its interstate sales, at least where it is also engaged in local retailing, were surely not surprising in view of *Felt & Tarrant Manufacturing Co. v. Gallagher*²¹⁶ and the cases upholding the constitutionality of a use tax.²¹⁷ It would be an idle gesture, and one at odd variance with the realistic temper of the present Court, to uphold the constitutionality of the use tax and to deny the validity of reasonable means of enforcing such a tax. The remarkable feature of the *Sears Roebuck* and *Montgomery Ward* cases is not the distance they went but the apparent reluctance of the Court to go further and sanction the imposition of a duty to collect use taxes upon mail order houses not doing a local business.

Wisconsin v. J. C. Penney Co.,²¹⁸ which sustained the constitutionality of the Wisconsin dividend tax, is less surprising upon further reflection than it is at first glance. Although the designation of a tax on outgo as an income tax seems a perfect contradiction in terms, it is true that Wisconsin could have attained the result of its dividend tax by raising the rates of its income tax. There was ample precedent for Mr. Justice Frankfurter's reluctance to be bound by formal labels in passing upon the constitutionality of a tax. Even Mr. Justice Roberts' dissent supported him on this point.

²¹² *Curry v. McCanless*, 307 U. S. 357 (1939); *Graves v. Elliott*, 307 U. S. 383 (1939).

²¹³ 312 U. S. 649 (1941), cited note 171 *supra*.

²¹⁴ *Nelson v. Sears Roebuck & Co.*, 312 U. S. 359 (1941), cited note 157 *supra*.

²¹⁵ *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373 (1941), cited note 163 *supra*.

²¹⁶ 306 U. S. 62 (1939).

²¹⁷ Note 154 *supra*.

²¹⁸ 311 U. S. 435 (1940), cited note 146 *supra*.

Turning to the commerce cases we also find little in the way of radical innovation if, confining ourselves to current history, we refuse to let memory stray to the halcyon days of an unreconstructed Court. The present Court is sensitive, perhaps hypersensitive, to the fact that the commerce clause may be invoked, not merely to keep the channels of national commerce clear but also to build an unwarranted immunity from the ordinary burdens of state taxation. Its bitterest critic would scarcely accuse the members of the present Court of undue sentimentality toward states' rights. They are not unaware, however, that states have budgets to meet and revenue to raise. Equality is the evident theme of the recent commerce cases. If a state tax, not only in form but in substance, discriminates against interstate commerce, the Court will strike it down as it did the North Carolina tax in *Best & Company v. Maxwell*.²¹⁹ A tax which does not, however, discriminate against interstate commerce but simply aims at putting interstate and intrastate business upon a parallel tax footing, has better than an even chance of being sustained.

There are little ironies in the life of the Supreme Court, just as there are in the lives of lesser mortals. No one, for example, better expressed the attitude of the present Court toward federal tax matters than Mr. Justice McReynolds when he declared twenty years ago that "logic and taxation are not always the best of friends,"²²⁰ and added eight years later, "that taxation is an intensely practical matter."²²¹ Taxation, especially federal taxation, is an intensely practical matter with the members of the present court. Keenly conscious of the deplorable condition of federal finances and the pressing need for a strong and equitable federal tax system, they are ruthlessly determined that the taxpayer who has ability to pay must shoulder his fair share of the federal tax burden. Avoidance schemes are definitely taboo.

No matter how craftily a plan to reduce taxes is constructed, no matter how impressively it is buttressed with ingenious legalistic arguments, if, in practical substance it is a device to escape paying a tax which the Court regards as justly due, it will receive rough treatment. This is, of course, the explanation of the cases on assigned income.²²² It is the explanation of the cases in connection with the estate tax, which denied the insurance exemption to the annuity, single-premium insurance policy plan.²²³ It was the driving consideration in the cases

219. 311 U. S. 454 (1940), cited note 182 *supra*.

220. Concurring opinion of McReynolds, J., in *Sonneborn v. Cureton*, 262 U. S. 506, 522 (1923).

221. *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 212 (1930).

222. Lowndes, *The Tax Decisions of the Supreme Court, 1940 Term* (1941) 90 U. of PA. L. REV. 1, 3-8.

223. Pp. 158-160 *supra*.

which held that for gift tax purposes single-premium policies of insurance must be valued at their replacement cost, rather than cash-surrender value.²²⁴

This same realistic attitude was the controlling factor in the small group of cases in which the Supreme Court at the last term abandoned the government to sustain the contention of the taxpayer. The elaborate legalistic argument that the government built up in *Maass v. Higgins*,²²⁵ for example, to justify taxing receipts from dividends, interest, and rent as part of the gross estate of a decedent valued a year from death, could not stand against the commonsense consideration that having taxed these items under the income tax as income of the estate there was no justice in taxing them again under the estate tax. The Court felt that if the income of a partnership was to be taxed as the income of the partner, it was only fair to treat partnership income entirely as the income of the partner and allow individual losses to be offset against partnership gains.²²⁶ Again, the Court realized that if there are to be joint returns, the only sensible thing is to treat them as joint returns rather than several returns of several taxpayers filed simultaneously.²²⁷ Probably the Court's solicitude for the taxpayer in this connection was influenced also by awareness that although the government would lose revenue by its espousal of the single taxpayer concept in connection with joint returns in some cases, it would gain in others.

224. Pp. 160-162 *supra*.

225. 312 U. S. 443 (1941), cited note 103 *supra*.

226. Lowndes, *loc. cit.* *supra* note 222, at 25, 26.

227. *Id.* at 22-24.